

***United States Court of Appeals  
for the Second Circuit***



**RESPONDENT'S  
BRIEF**



# No. 74-2516

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

OLIN CONSTRUCTION CO., INC.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION  
and JOHN T. DUNLOP, SECRETARY,

Respondents.

ON PETITION TO REVIEW AN ORDER OF THE  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

BRIEF FOR THE SECRETARY OF LABOR

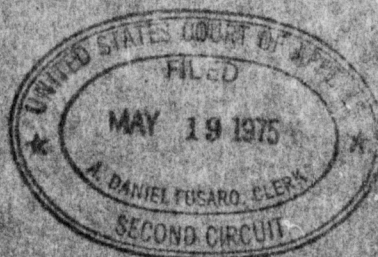
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JOHN T. DUNLOP, SECRETARY OF LABOR, \*/

Respondents.

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ON PETITION TO REVIEW AN ORDER OF  
THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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BRIEF FOR THE SECRETARY OF LABOR

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COUNTERSTATEMENT OF ISSUE PRESENTED

Whether substantial evidence supports the Commission's finding that Olin committed a serious violation of 29 CFR 1926.652(b), the Secretary's trenching-safety standard.

COUNTERSTATEMENT OF THE CASE

1. Nature of case

This case is before the Court pursuant to section 11(a) of the Occupational Safety and Health Act of 1970 (OSHA) (84 Stat. 1590, 29 U.S.C. 651 et seq.) on Olin's petition to review an

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\*/ Dr. Dunlop succeeded Mr. Brennan as Secretary of Labor March 18, 1975. Fed. R. App. P. 43(c).

administrative law judge's decision which became the Commission's final order September 27, 1974 (App. 6-25). <sup>1/</sup> This Court has jurisdiction under 29 U.S.C. 660(a), the violations found having occurred near Brewerton, New York.

2. Facts found by the Commission

Olin is a large construction company which does an annual business of over \$5 million and employs 150 workers daily (App. 11; 49-50). In August 1973 it was engaged with 100 of those employees in digging trenches and laying pipe for a 20-mile sanitary sewer system along Lake Oneida (App. 11-12; 68, 87). On August 9, 1973 OSHA compliance officer Harold Pauly and Area Director Chester Whiteside drove up to one of Olin's trench sites to conduct a routine safety inspection. The inspectors were well known by Olin's workers because they had recently investigated other worksites on this project, and as they approached they observed a "flurry of activity," heard people say "Here they come," and saw a worker hurriedly emerging from the trench by a ladder placed in one end (App. 7, 11-15, 21; 88-89, 92-93; Tr. 119-120). The trench was discovered to be 9 feet deep, 12 to 15 feet long, 9 to 10 feet wide, and dug

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<sup>1/</sup> "App." references are to the printed Appendix lodged with the Court. Those preceding a semicolon are to the administrative law judge's findings and conclusions; those following, to the supporting evidence.

in unstable lake-bottom soil composed of sand, silt and loam (App. 14-15, 20-21; 59-62, 66-67; 159). Its walls were nearly vertical, part of those walls had been cut through earth which had previously been disturbed to lay a gas pipe, and excavated soil was piled close to the trench lip, further increasing its instability (App. 13-15, 19-21; 62-65, 79, 90, 98, 106; 157; Tr. 9-10). <sup>2/</sup> The trench was completely unbraced apart from two plywood sheets at its ladder end which were ineffectually secured by a single trench jack, and was not shored, sloped, or otherwise protected against collapse (App. 14-15, 20; 59-64, 77-79, 90, 93-95; 157-161). At the trench bottom opposite this attempted bracing the inspectors also observed "shovels, crow-bars, some material\*\*\*used to join\*\*\*pipes together" and other implements, indicating that work had recently been done there (App. 15; 59-61, 63, 81, 91-92; 159, 161).

Upon making these observations the inspectors immediately asked Olin foreman Timothy Duerr whether any employees had been working in the trench and were told that two named employees, Christian and Spaingler, had been working at the trench bottom "where the shovels were located" (App. 15, 21; 64-65, 81, 91). Whiteside confirmed the employees' presence in the trench by questioning them (App. 21; 91, 100).

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<sup>2/</sup> Compliance officer Pauley testified that the trench walls possessed no angle of repose but dropped nearly straight down so that the width of the trench at its bottom was "approximately the same width as the top" (App. 62-64, 79). Area Director Whiteside indicated the trench walls were not absolutely vertical, but were somewhat sloped (App. 90, 94). The photographic evidence indicates the trench walls were virtually vertical for much or all of their depth, but were partly sloped at various points around the trench bottom (App. 157-161).

### 3. Administrative proceedings

As a result of the above inspection the Secretary on August 16, 1973 cited Olin for a repeated serious violation of the Department's trench-shoring requirements and a repeated nonserious violation of the standard prohibiting storage of excavated material ("spoils") close to the trench (App. 31-33).<sup>3/</sup> Olin was also served with proposed penalties of \$1800 and \$270 for these violations and ordered to abate them immediately (App. 32-34). The company admitted the nonserious spoils violation but pursuant to 29 U.S.C. 659(d) timely contested the serious violation, the repeated nature of both violations, and the proposed penalties (App. 13, 35). The Secretary's formal complaint before the Commission and Olin's answer followed, and the case was heard by the Commission's administrative law judge pursuant to 29 U.S.C. 661(i) on January 23-24, 1974 (App. 10, 36-46). The judge's decision issued August 28, 1974, and became the Commission's final order September 27 when no Commissioner granted Olin's petition for discretionary review (App. 28-30).

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3/ Section 5(a)(2) of the Act, 29 U.S.C. 654(a)(2), provides that every employer affecting commerce "shall comply with occupational safety and health standards promulgated under this Act." 29 CFR 1926.652, the pertinent standard, requires with respect to trenching operations that:

(b) Sides of trenches in unstable or soft material, 5 feet or more in depth, shall be shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working within them. See Tables P-1, P-2\*\*\*.

(Footnote con't)

(Footnote con't)

\*\*\*

(d) Materials used for sheeting\*\*\*, bracing, shoring, and underpinning\*\*\*shall be designed and installed so as to be effective to the bottom of the excavation.

(e) Additional precautions by way of shoring and bracing shall be taken to prevent slides or cave-ins when \*\*\* trenches are made in locations adjacent to backfilled excavations\*\*\*.

Table P-1 recommends a 45-degree slope for "Average Soils" and specifies that "Clays, Silts, Loams or Non-Homogeneous Soils Require Shoring and Bracing." In addition, 29 CFR 1926.651(i)(1) requires that "excavated or other material shall be effectively stored and retained at least 2 feet\*\*\*from the edge of the excavation."

Section 17(a), 29 U.S.C. 666(a), provides that any employer who "repeatedly violates the requirements of\*\*\*any standard \*\*\*promulgated pursuant to\*\*\*this Act, may be assessed a civil penalty of not more than \$10,000 for each [such] violation." Sections 17(b) and (k), 29 U.S.C. 666(b) and (j), define a serious violation as one which creates a substantial probability that serious harm could result "unless the employer did not, and could not with the exercise of reasonable diligence, know of the violation's presence," and impose mandatory civil penalties of up to \$1,000 for each such violation. It is undisputed that Olin was aware of the Department's trenching regulations and knew or could have known of the violations here (App. 7-9, 15-18; 67, 140, 147). Section 17(c), 29 U.S.C. 666 (c), defines nonserious violations as those which are "not\*\*\* serious" and permits discretionary penalties of up to \$1,000 for them.

Olin had previously been cited August 7 for identical violations discovered at a neighboring trench site August 3 (App. 7-9). This citation was the genesis of the instant "repeated" charges.

4. Decision below

On the above record the judge reduced the "repeated" allegations to simple serious and non-serious violations on grounds not before the Court and affirmed them as modified (App. 16-22). In support of this result he expressly rejected company testimony that the trench was stable and sloped 45 degrees, that company employees were installing bracing when the inspectors arrived, and that no employees had worked at the trench bottom, inter alia stating that Olin "had employees working in the trench" and that he gave "full credibility to the testimony of [the Secretary's] witnesses insofar as their conversations with the [company's] employees on \* \* \* exposure in the trench" (App. 15, 20-21). In addition, he reduced the serious-violation penalty from \$1,800 to \$800 because that violation was not repeated, but assessed a \$250 penalty for the non-serious spoils violation---only \$20 below the proposed repeated penalty---because the Company admitted two spoils violations within a week and this violation both "exacerbat[ed] the serious hazard and [was] a definite hazard in and of itself" (App. 21-23).

Olin's petition for review by this Court followed.

ARGUMENT

THE COMMISSION'S ORDER IS SUPPORTED BY SUBSTANTIAL EVIDENCE

1. As detailed supra, on August 16, 1973 the Secretary cited Olin for failing adequately to brace, slope or otherwise protect the sides of a 9-foot-deep trench dug in unstable soil, and for storing excavated material near the trench lip. <sup>4/</sup> The judge affirmed these violations; the Commission let that affirmance become final despite the company's assertions of error (App. 29-30); and the record evidence fully supports this result. Thus, inspector Pauly---who held two degrees in geology and had spent eight years practicing that science---testified the trench was dug in "loose unconsolidated" earth composed of sand, silt and loam which was "less stable than average soil" and its sides were virtually vertical (App. 52-53, 62, 79). Pauly also stated that the attempted bracing at the trench's ladder end was inadequate because "if the wall would cave in, the [bracing] would close up"; that this failure to slope or shore could cause the trench to collapse and suffocate employees; and that the weight of spoils on the trench lip could independently cause "the entire side of the trench [to] fall in on the employee" (App. 66-67, 72-73, 91-92). While Area Director

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<sup>4/</sup> The courts have frequently examined the Act's scope and operation, which need not be repeated here. E.g., National Realty and Const'n. Co. v. OSHRC and Secretary, 489 F.2d 1257 (C.A. D.C., 1973); Brennan v. OSHRC and Gerosa, Inc., 491 F.2d 1340 (C.A. 2, 1974); Brennan v. OSHRC and John J. Gordon Co., 492 F.2d 1027 (C.A. 2, 1974); REA Express, Inc. v. Brennan and OSHRC, 495 F.2d 822 (C.A. 2, 1974); Brennan v. OSHRC and Underhill Construction Co., ---F.2d---(C.A. 2, Nos. 74-1568, 1579, March 10, 1975).

Whiteside believed the trench walls to be sloped "some" rather than "straight down," he agreed that "the entire trench \* \* \* was unsafe" both inside and beyond the bracing (App. 90, 93-95), and that this was particularly true because part of the trench walls consisted of unstable "old fill \* \* \* earth that had been worked in previously" (App. 154). <sup>5/</sup> Moreover, it was undisputed that the trench bottom beyond the attempted bracing contained shovels, wadding and other pipelaying tools used by Olin employees; and when the inspectors asked Olin foreman Duerr whether any employees had been working in the trench, he replied that two Olin employees had been working there (App. 64-65, 81, 91-92, 99-100). On this record the judge's conclusion that Olin committed a serious safety violation by permitting its employees to lay pipe in an unstable excavation which "had insufficient sloping and bracing \* \* \* and was a dangerous trench in which to be working" (App. 20) was plainly proper, since each of his findings "was clearly supported by the testimony of witnesses whom [he] had some reason to believe credible and who at the very least created a fair conflict with testimony of the [company's] witnesses."

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<sup>5/</sup> This stability testimony was corroborated by Olin job superintendent Murphy, who first maintained the trench was "stable, firm, sandy \* \* \* soil" but admitted under questioning that both "old fill" and sand were unstable (App. 105 -106, 124-125).

NLRB v. Southern Cement Co., 417 F.2d 198, 199 (C.A. 5, 1969).

The Commission's order should accordingly be affirmed. NLRB v. United Ins. Co., 390 U.S. 254, 260 (1968); NLRB v. Orleans Mfg. Co., 412 F.2d 94, 95-96 (C.A. 2, 1969). See National Realty and Const'n. Co. v. OSHRC and Secretary, 489 F.2d 1257, n. 24 (C.A.D.C., 1973). <sup>6/</sup>

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<sup>6/</sup> The above cited evidence also disposes of Olin's related contention (Br., p. 11) that the judge "completely ignored" company testimony the trench's sides were sloped 45 degrees. In light of the inspectors' unanimous conclusion that the trench was inadequately protected, photographs demonstrating a steeper slope, and record indications that the testimony of company witnesses was unreliable in other respects, infra, pp. 11-13, the judge's decision to credit the inspectors was not only defensible, but correct.

In any event even if the trench walls were sloped 45 degrees a violation was established, since Table P-1 merely recommends this slope for "Average Soils" and specifies that "Silts, Loams or Non-Homogeneous Soils Require Shoring and Bracing." Supra, n. 3. The soil of the instant trench was non-homogenous silty loam which was "less stable than average soil" and was rendered even more unstable by the presence of old backfill and spoils at its edge. It was accordingly "unstable" within the meaning of 29 CFR 1926.652(b) even if sloped 45 degrees, since a greater slope under these conditions was called for. See United States v. Dye Const'n. Co., 510 F.2d 78 (C.A. 10, 1975).

2. Olin principally asserts (Br., pp. 11-13) the judge's explicit credibility resolutions should be overturned in favor of company testimony that no employees had "worked in" the trench because Christian and Spaingler were merely installing bracing from the trench ladder when the inspectors arrive. The short answer is that even if this testimony were accepted a violation was established, since the trench had admittedly been open for over an hour before the inspectors' arrival (App. 145) and Olin took no steps to limit its workers' access to this hazard. As this Court has recently noted in similar circumstances,

to prove a violation of OSHA the Secretary of Labor need only show that a hazard has been committed and that the area of the hazard was accessible to the employees of the cited employer  
\* \* \*. \* \* actual observed danger is unnecessary [because] \* \* \* the keystone of the Act \* \* \* is preventability. \* \* \* Underhill would have us hold that for a citation properly to issue, an employee of the particular employer creating the [cited] perimeter hazard must be seen by the inspector teetering on the edge of the floor 150 feet \* \* \* from the ground. No such interpretation of the standards would be reasonable.  
No such interpretation is consistent with, let alone called for by, the Act.

Brennan v. OSHRC and Underhill Const'n. Co., slip op. pp. 10-14 (C.A. 2, Nos. 74-1568, 1579, March 10, 1975)(emphases added).

In any event, even if Underhill is not dispositive credibility resolutions are for the agency rather than the Court and will not be disturbed unless wholly irrational on any record reading.

NLRB v. Walton Mfg. Co., 369 U.S. 404, 408 (1962); NLRB v. Electronic Die Corp., 423 F.2d 218, 220 (C.A. 2, 1970), cert. den. 400 U.S.

833. 7/ There was no such irrationality in the judge's finding that employees were working in the trench and not merely installing bracing here. First, as detailed supra, the inspectors observed a flurry of hurried activity, heard people calling "Here they come," and saw a worker come up the ladder out of the trench as they alighted --- a suspicious circumstance if that worker was merely complying with OSHA requirements by installing bracing. Second, in the unbraced part of the trench the inspectors saw shovels, wadding, and other pipelaying materials admittedly used by Olin workers (App. 119). Olin superintendent Murphy was unable to account for the presence of these materials, which were not needed if employees were just installing bracing (App. 120); and while foreman Duerr said they had been "thrown in there for future use to install the lateral [sewer pipe]," he also stated his crew was "Nowhere near" installing the pipe when the inspectors arrived (App. 141). The need to "throw in" material which were not immediately needed, and which would apparently interfere with the further bracing the company contemplated (App. 106-107, 135-145; 159-161), was not explained. Most importantly, the inspectors agreed they asked Duerr if any employees had been working in the trench and

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7/ As the Fifth Circuit has noted, agency credibility resolutions are essentially "nonreviewable" unless contradicted by "uncontrovertible documentary evidence or physical facts." NLRB v. Dixie Gas, Inc., 323 F.2d 433, 437 (1963). See NLRB v. Warrensburg Board and Paper Corp., 340 F.2d 920, 922 (C.A. 2, 1965).

that Duerr said two employees were working in the trench "where the shovels were" (App. 64, 81, 100). Superintendent Murphy further admitted that Duerr indicated to him "they had men working in the trench" (App. 120). Against this testimony foreman Duerr first maintained that his crew was installing bracing when the inspectors arrived and that this installation required one man to lower plywood panels, then descend the ladder halfway to secure those panels with trench jacks (App. 136-137, 145-146). He then said that only this employee had been in the trench that morning (App. 150). Finally, he indicated he told the inspectors that two employees had been in the trench because they were "Putting the top brace in \* \* \* one \* \* \* halfway on the ladder, holding it, while the other person lowered it down with the ropes" (App. 151-152). Apart from the fact that Duerr mentioned neither this explanation nor the asserted installation of bracing to the inspectors --- a suspicious lapse in view of the purported res gestae --- his admission that two men had been in the trench contradicted his own description of their duties, which required only one man to descend there. In light of these inconsistencies and record indications that company testimony was unreliable in other respects, <sup>8/</sup> the judge's determination

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<sup>8/</sup> Job superintendent Murphy admitted he had no familiarity with civil engineering, geology, or soil specifications formulated by the project's consulting engineers (App. 108-109, 117-118). He then characterized this trench without hesitation as composed of "A firm, stable soil \* \* \* Sandy clay" (App. 105, 120). However, under questioning by the judge he admitted that old fill was unstable, that he "would not consider sand as very stable," and that he considered "clay itself" treacherous

to "give full credibility to the testimony of [the Secretary's] witnesses insofar as their conversations with [Olin's] employees" was plainly rational and should be affirmed.

3. Finally, Olin contends (Br., pp. 13-14) the trench was safe because inspector Pauly would not otherwise have entered it to take depth measurements. This argument is simply another aspect of the company's trial contention that the trench was safe irrespective of its compliance with the applicable regulation (App. 106-107, 139; Tr. 175-177) --- a contention the First Circuit has emphatically rejected because "the regulation unambiguously forecloses such [private determinations]."

Messina Const'n. Corp. v. OSHRC and Secretary, 505 F.2d 701, 702 (1974). Moreover, Area Director Whiteside testified without contradiction that he sent Pauly into the trench "with great reluctance" because the company had contested previous citations, it was necessary to obtain strong evidence regarding the trench's depth, and as a matter of practical necessity "In many instances, we are obliged to expose ourselves to the hazards that we are citing [in order successfully to cite them]" (App. 90, 96-97). In short, as the judge found (App. 21), the inspectors' conduct neither made this trench less dangerous nor

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(Footnote con't)

(App. 124-125). With respect to a similar trench cited earlier that month he flatly asserted that its wall was sloped 45 degrees; faced with a photograph indicating it to be "straight down" admitted there was "not \* \* \* that much repose"; and after a long hesitation recharacterized it as possessing a much steeper slope (App. 115-117; Tr. 182).

offered the company any independent ground for asserting it was safe. <sup>9/</sup> ✓

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9/ Citing Madden Const'n. Co. v. Hodgson, 502 F.2d 278 (C.A. 9, 1974), Olin further asserts (Br., pp. 14-16) the instant penalties are improper because the Secretary proposed lesser ones for similar but non-repeated violations and the Commission has either "created a penalty when none had been proposed by the Secretary; or \* \* \* increased the penalty which might have been proposed if the penalties were based on non-repeated violations." The contention is that the Commission lacks power to raise penalties proposed by the Secretary or to impose penalties sua sponte. But in addition to the fact that the judge here lowered penalties proposed by the Secretary, the Ninth Circuit has deleted from Madden the sentence relied upon by the company. Moreover, this Court has approved previous Commission actions increasing proposed penalties in accord with relevant evidence, indicating that so long as the factors specified in 29 U.S.C. 666(i) were considered such actions do "not constitute an abuse of discretion." REA Express, Inc. v. Brennan and OSHRC, 495 F.2d 822, 827 (1974). Since the judge in this case indisputably considered those factors (App. 15, 19-23), the Commission has broad discretion to "modify" proposed penalties, 29 U.S.C. 659(c), and the Secretary in further proceedings would merely repropose the penalties already found proper, any remand on this issue would be pointless. See Brennan v. OSHRC and Gerosa, Inc., 491 F.2d 1340, n. 15 (C.A. 2, 1974).

Finally, Olin contends (Br., pp. 7-9) the instant order was erroneously based on a substantial-evidence rather than a preponderance test. The short answer is that the Commission let the judge's order become final despite an identical contention (App. 29) --- persuasive evidence it believed this error did not affect the result. The Commission's response was clearly correct, since in addition to the fact that Olin showed none of the specific prejudice needed to overcome the harmless-error rule, e.g. U.S. v. Pierce Auto Freight Lines, 327 U.S. 515, 528-530 (1946); Nat'l Roofing Contractors Ass'n. v. Brennan, 495 F.2d 1294, 1296 (C.A. 7, 1974), cert. den. 95 S. Ct. 775, the judge's dispositive credibility resolutions would not have differed under either test.

CONCLUSION

For the above reasons the Commission's order should  
be affirmed and enforced in full. 29 U.S.C. 660(a).

Respectfully submitted,

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MAY 1975

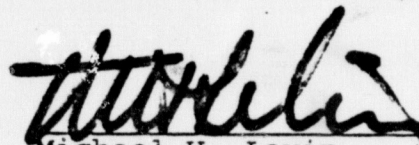
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CERTIFICATE OF SERVICE

I hereby certify that on this 16<sup>th</sup> day of May 1975  
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#### ADDENDUM

The following pages of the hearing transcript were inadvertently omitted from the Secretary's counterdesignation of record.

believe Mr. Ball said that there was no contest as to the circumstances involved in the non-serious violations.

That will include --

JUDGE ORINGER: You mean the first?

MR. GOTSCH: As well as the second.

There is contest as to the proposed penalty on the second. I think this is something that we have --

JUDGE ORINGER: Is that correct?

MR. BALL: I thought you were saying that there was no contest only as to the first of the non-serious violations in the first citation.

Everything else theoretically is contested except that I would stipulate we are not going to contest the actual facts involved on the second non-serious violation, but inasmuch as it is a repeat non-serious violation, we feel that the question of whether or not the amount of the assessment is actually non-serious -- is actually a repeat situation, and the amount of the proposed citation -- of the proposed penalty, I

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am sorry.

JUDGE ORINGER: Let me be clear in my mind.

In other words, you are talking about 1926.651(1)(1), 'Failure of the employer to store excavated material at least 2 feet or more from the edge of the excavation.'

Is that what you are talking about?

MR. BALL: Yes.

JUDGE ORINGER: In other words, you don't contest the violation; is that correct, but you do argue that it is not repeated.

MR. BALL: And that the penalty on that basis is excessive.

JUDGE ORINGER: But you are not contesting the violation.

MR. BALL: Not the actual violation itself, no.

JUDGE ORINGER: In other words, there is no contest as to whether or not there was such a violation on that date.

MR. BALL: Not on the facts; that is correct.

JUDGE ORINGER: All right.

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had you actually been on the job and made -- and been there with other enforcement officers?

Were you generally familiar with what was going on?

A Not at this location, no.

Q Not at this particular work site; is that what you mean?

A Right.

Q But in the context of the project, the entire project, you had been at the project a number of times.

THE WITNESS: If the Court will permit me, that is much to general a question.

I will be pleased to tell you that I had been there, not at that location, but at a location some two miles or so in another direction.

JUDGE ORINGER: On the same 20 mile project?

THE WITNESS: Yes, Sir.

JUDGE ORINGER: Did you find any violations on that one?

THE WITNESS: No, Sir, we were not there for the purpose of conducting an

Q What were you there for?

A Trenching and excavation had become a special interest program by the mandate of the Secretary of Labor, and I have control of compliance officers in three offices, Albany, Syracuse and Buffalo.

On occasion, we hold what is known as staff meetings at which time we discuss techniques, procedures, and we, in many instances, make field trips.

On one occasion we had gone in two or three cars, the entire staff, to an area where the Olin Construction Company was digging. I don't know if that is their beginning point of the work site or just a general point.

I could not tell you the name of the road. I could find it, but I -- if you think it is important, we can probably find the name of it.

Q You had been there with the other enforcement officers as a staff meeting --

A As a field trip or a field excursion for instruction purposes only.

Q And that time on August 3rd that you went back with Mr. Pauly, was this also part of a field

Q Would you explain to the Court how you obtained this information and where there was any work which allowed you to obtain an opinion as to the stability of the material in question?

A When we installed the main line, which is the first pipe that is installed, the main line is put in and a crew comes along at a later date and installs the lateral, and we use steel shields for the main line which is for the protection of the employees, and when we put the main line in, there was no pressure, whatsoever.

In other words, the banks were dug at 90 degrees and there was no pressure against the shield whatsoever. The banks stayed there by themselves.

JUDGE ORINGER: When you say 90 degrees, you mean straight down?

THE WITNESS: Straight down, right.

Q I refer you again to Exhibit 1, and it shows Mr. Whiteside kneeling on, I believe, the side of the Lakeshore Road; is that correct?

A Correct.

Q Now--and Lakeshore Road will extend south from the point where Mr. Whiteside is; is that correct, that is the main road behind him?

A Yes, the biggest portion of the road would be behind him.

Q And it was down that road, you went past that particular point where this so-called main line was actually installed?

A Right.

Q And that would run east and west and--that is the main line would run east and west and the lateral would run north and south; is that correct?

A Right:

Q And how deep was this main line that went through there?

A Approximately 10--

Q 10 feet or so?

A I would say 10 to 11 foot.

Q And when you went through there, your observation was that you cut a straight, narrow 90 degree trench, and even though you used

the shield, there was no slippage or anything of the banks?

A No.

Q And your observation was just the same type of material which you saw in the excavation being made on August 3rd, as depicted in Exhibits 1, 2 and 3?

A Yes.

Q Is it your opinion that this material remained in place without any additional support?

A Yes.

Q And would you characterize this as stable or unstable material?

A Stable material.

Q Now, at the time that you made these observations that are depicted in Exhibits 1, 2 and 3, did you notice the bottom of the trench which was being made?

Did you notice the bottom of the trench that was being dug at that particular time?

A Did I notice it?

Q Yes, sir.

A Yes, I did.

Q And did you observe the sides of the trench?

A No.

Q Did you see any pipe or any tools in this particular ditch?

A No.

Q Now, as you generally observed an excavation, Mr. Murphy, when you previously testified that you had seen the bottom and you had seen the sides of the ditch, was that a 90 degree angle, the sides in reference to the bottom of the ditch itself?

A No, it was not.

Q Were they laid back? I mean, was there an angle of repose?

A Yes.

Q And was it laid back to-- on well the sides of the ditch laid back to what you would call stable soil?

A Yes.

Q And do you have an opinion as to what that angle of repose was?

A I would estimate it at approximately 45 degrees.

Q Now, in your experience as project superintendent, have you seen what we call unsafe

U.S. DEPARTMENT OF LABOR  
OFFICE OF THE SOLICITOR  
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MAY 16 1975

A. Daniel Fusaro, Esq.  
Clerk,  
United States Court of Appeals  
for the Second Circuit  
United States Courthouse  
Foley Square  
New York, New York 10007

Re: Olin Const'n. Co. v. OSHRC and Dunlop,  
(C.A. 2, No. 74-2516)

Dear Mr. Fusaro,

Enclosed for immediate filing are twenty-five copies of the brief for Respondents in the above case. As indicated by the certificate incorporated in the brief, copies have simultaneously been served on all parties or counsel of record.

Sincerely,

A handwritten signature in dark ink, appearing to read "Michael H. Levin", is written over the typed name.

Michael H. Levin  
Counsel for Appellate Litigation

Enclosures

cc: Donald J. Ball, Esq.  
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